

**UNITED STATES BANKRUPTCY COURT**

**DISTRICT OF HAWAII**

In re	)	Case No. 02-02394
	)	Chapter 7
MONICA ANNE WILLIAMS,	)	
	)	
Debtor.	)	
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	)	Adv. Pro. No. 03-90036
MONICA ANNE WILLIAMS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
ACCESS GROUP INC. and UNITED	)	
STATES DEPARTMENT OF	)	
EDUCATION,	)	
	)	
Defendants.	)	
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**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The trial in this adversary proceeding was held on August 30, 2004.

David Cain represented Debtor/Plaintiff Monica Anne Williams, Benjamin V. Chen represented Defendant Access Group, Inc. (“Access”), and Theodore G. Meeker represented Defendant United States Department of Education (“DOE”).

Based on the parties’ stipulations and the evidence presented at trial,

the court makes the following:

#### FINDINGS OF FACT

1. Ms. Williams is a forty-five year old woman. She is divorced and has no children. She is healthy, intelligent, independent, well-educated, and articulate.

2. Ms. Williams graduated from high school, attended a junior college, transferred to the University of California Santa Cruz, and obtained a Bachelor of Arts degree in Liberal Studies and Natural History in 1984.

3. After she graduated from college, Ms. Williams held jobs as a ski instructor, fire fighter, and substitute teacher. She obtained her teaching certificate in about 1986 and continued to work as a substitute teacher. In about 1988, she obtained a full time job as a teacher in Idaho.

4. In about 1992, Ms. Williams decided to become a physical therapist. She returned to school at Boise State University to take prerequisite science classes. She financed her studies by selling her house, working, and obtaining loans made directly by, or guaranteed by, the federal government. The record does not disclose the original amounts of these loans.

5. In the fall of 1998, Ms. Williams entered a doctoral program in physical therapy at the Arizona School of Health Sciences ("ASHS"). In order to

finance her studies at ASHS, Ms. Williams applied for and obtained from Access five loans, in the aggregate principal amount of \$57,900.00. These loans were funded in part by one or more nonprofit institutions.

6. Ms. Williams obtained her Doctor of Physical Therapy degree from ASHS on August 28, 2001.

7. Ms. Williams moved to the island of Maui in November 2001. She obtained her physical therapy license from the State of Hawaii on December 11, 2001. She began working as a physical therapist in January 2002 with Mauka Physical Therapy Inc. She worked thirty hours per week.

8. Ms. Williams could not afford the payments due on both the Access Group loans and the direct government loans. Hoping to reduce the payments to an affordable level, she submitted an application to Access in February 2002 to consolidate all of her loans. On April 3, 2002, Access notified Ms. Williams that her consolidation application had been “accepted and approved,” and that as soon as “lender verification certificates” were obtained, “we will complete the consolidation of your student loans.” Shortly thereafter, however, Access sent Ms. Williams information which indicated that only the private loans, and not the direct government loans, would be consolidated. Ms. Williams promptly wrote a letter to Access requesting that the consolidation of her

loans be terminated. By that time, however, the consolidation had already been completed.

9. Ms. Williams filed the petition commencing her chapter 7 bankruptcy case on July 3, 2002. She did so because she had been unable to consolidate her student loans. The court issued her discharge on October 7, 2002.

10. After she received her discharge, Ms. Williams consolidated her direct loans. On November 4, 2002, she signed a promissory note in favor of DOE pursuant to which she promised to pay all amounts disbursed by DOE in payment of the underlying student loans. Between December 16, 2002, and January 8, 2003, DOE disbursed \$75,584.39 to the holders of the underlying loans. After adjustment, the original principal balance of the consolidation loan was \$75,579.36.

11. In March 2003, Ms. Williams obtained a massage therapy license from the State of Hawaii. She obtained the license in order to add to her income potential.

12. Between January and May 2003, Ms. Williams paid a total of \$1,861.57 to DOE. Ms. Williams has made no payments to DOE since then. Ms. Williams has never made any payments to Access.

13. Since moving to Maui, Ms. Williams has held a variety of part

time jobs. She works as a physical therapist, a massage therapist, an instructor of massage therapy, a house- and pet-sitter, and a crewmember on a cruise boat. Her work hours vary with the amount of work available. In some weeks, she works fifty to sixty hours, but in other weeks, she only works twenty to thirty hours. Accordingly, her income also varies. According to her tax returns, Ms. Williams' adjusted gross income was \$32,106 in 2002 and \$14,529 in 2003. Ms. Williams expects that her income will increase to the range of \$2,440 to \$2,800 per month in 2004 and subsequent years.

14. Ms. Williams is unwilling to accept a full-time job as a physical therapist. Because the work is so physically and emotionally demanding, Ms. Williams fears that she would become "burned out" and would be unable to continue working as a physical therapist for long. She prefers to balance part time work in physical therapy with other jobs. If Ms. Williams were willing to accept a full-time job as a physical therapist, she could probably obtain such a position on Maui and earn a starting salary of \$60,000 per year.

15. If such a position were not available on Maui, one would probably be available in Honolulu. Ms. Williams is unwilling, however, to move from Maui to a larger community, such as Honolulu, with better employment opportunities, because she does not want to live in a big city and because she

wants to be near her mother, who lives in Kihei, Maui. Ms. Williams' mother, Anna Dumbleton, is eighty-two years old. At present, Ms. Dumbleton is healthy (for a person of her age) and able to care for herself, but it is likely that she will need significant care in the relatively near future.

16. Ms. Williams' expenses are minimal. She leads a very modest life and has no unreasonable or excessive expenditures. Based on her current income, she believes that she could afford to pay no more than \$375 per month toward her student loans. She is obligated, however, to pay about \$880 per month.

17. Ms. Williams has no significant nonexempt assets. She and her two sisters are equal beneficiaries of a trust, established by her mother, that owns the condominium in Kihei in which her mother lives. Ms. Dumbleton purchased the condominium in 2002 for \$145,000. The value of Ms. Williams' interest in the trust is highly uncertain. The condominium is subject to a mortgage, but the record does not reveal the amount of the mortgage, so the amount (if any) of equity in the condominium is unknown. Further, the trust's assets would presumably be devoted to Ms. Dumbleton's care before any would be available to the residual beneficiaries. Because the cost of future support and care for Ms. Dumbleton is unknown, one cannot determine how much (if any) value will be left for Ms. Williams and her sisters.

18. Ms. Williams is in good physical health. She has suffered anxiety and depression as a result of her financial difficulties and the breakup of a relationship. Her mental condition has apparently improved somewhat, has not impaired her ability to earn a living and conduct her daily affairs, and is not likely to do so in the future.

Based on these findings of fact, the court makes the following:

### CONCLUSIONS OF LAW

1. Section 523(a)(8) provides that:

A discharge [in a chapter 7 case] . . . does not discharge an individual debtor from any debt –

(8) for an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship, or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

11 U.S.C. § 523(a)(8).

2. Ms. Williams' debts to Access and DOE are of the kind which section 523(a)(8) generally excepts from the discharge.

3. In order to establish undue hardship under section 523(a)(8),

the debtor bears the burden of proving that (a) the debtor cannot maintain, based on current income and expenses, a minimal standard of living for the debtor and the debtor's dependents if forced to repay the loans, (b) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans, and (c) the debtor has made good faith efforts to repay the loans. In re Pena, 155 F.3d 1108, 1112 (9th Cir. 1998), citing In re Brunner, 831 F.2d 395 (2d Cir. 1987). The debtor's burden is stringent. The debtor must show more than merely tight finances and more than garden-variety hardship.

4. The court can discharge a student loan obligation in part, so long as the debtor carries the burden of proving that payment of the discharged part would impose an undue hardship. In re Saxman 325 F.3d 1168 (9th Cir. 2003).

5. The first prong of the Brunner test requires the debtor to show that, based on the debtor's current income<sup>1</sup> and expenses, the debtor cannot maintain a minimal standard of living if required to pay the student loan debts. Ms. Williams has made this showing. Based upon her current income and her

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<sup>1</sup>The first prong of the Brunner test considers the debtor's current income. The debtor's ability to increase income should be considered under the third prong of the Brunner test. In re Birrane, 287 B.R. 490, 496 n.5 (B.A.P. 9<sup>th</sup> Cir. 2002).

modest (even austere) expenses, Ms. Williams cannot afford to pay more than \$375.00 per month toward the student loan debts while maintaining a minimal standard of living.

6. The second prong of the Brunner test requires the debtor to show “circumstances enabling the court to predict the longevity of the financial hardship, on a case-by-case basis.” In re Nys, 308 B. R. 436, 443 (B.A.P. 9<sup>th</sup> Cir. 2004). The court must determine whether the debtor faces any insurmountable barriers to financial recovery which will prevent the debtor from repaying the student loans for several years. These barriers may include (among others) serious mental or physical disability of the debtor or the debtor's dependents which prevents employment or advancement; the debtor's obligations to care for dependents; lack of, or severely limited education; poor quality of education; lack of usable or marketable job skills; underemployment; maximized income potential in the chosen educational field, and no other more lucrative job skills; limited number of years remaining in work life to allow payment of the loan; age or other factors that prevent retraining or relocation as a means for payment of the loan; lack of assets, whether or not exempt, which could be used to pay the loan; potentially increasing expenses that outweigh any potential appreciation in the value of the debtor's assets and/or likely increases in the debtor's income; and lack

of better financial options elsewhere. Id. at 446-47. The court must also consider the debtor's future prospects for employment. Id. at 444.

7. Ms. Williams has failed to carry her burden of proof on the second prong of the Brunner test. She faces no insurmountable barriers to improvement of her financial condition in the future. She is well-educated and has valuable job skills as a physical therapist. She has no mental or physical impairments which prevent her from working and advancing in her profession. She will probably be able to work for twenty or more years in the future. Admirably, she has undertaken the obligation to care for her elderly mother. Her mother does not require significant care at this time. Although her mother will doubtless require more care as she ages, many people find a way simultaneously to care for aging relatives and work full time. These dual responsibilities are onerous, but Ms. Williams is at least as able as the average person to bear them.

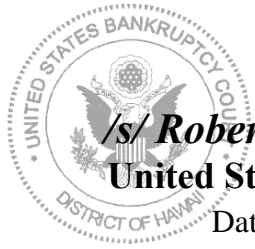
8. The primary barrier to Ms. Williams' financial rebirth is one which she has erected herself: her decision not to work full time as a physical therapist. The evidence shows that Ms. Williams likely could obtain such a job on Maui or Oahu and probably would double her income if she did so. This would provide Ms. Williams ample means to repay her student loans. Ms. Williams' desire to avoid "burn out" is understandable, but it does not rise to the level which

Congress decided to impose for the discharge of student loan obligations.

9. Ms. Williams has also failed to carry her burden of proof on the third prong of the Brunner test. The “good faith” test requires the debtor to show that the debtor has made appropriate efforts to repay the loan by maximizing income and minimizing expenses and to negotiate an affordable repayment plan. Id. at 499. The debtor’s inability to repay the student loans must result from factors beyond the debtor’s reasonable control, and not the debtor’s own willfulness or negligence. “Declining to obtain additional work is not a factor beyond [the debtor’s] reasonable control.” Id. at 500. By accepting a full time position as a physical therapist, Ms. Williams could earn enough to repay the student loans. Her decision not to take such a position means that she has not made a “good faith” effort to repay her student loan debts (as Brunner and its progeny define “good faith”).

10. DOE argues that the loan it holds is not dischargeable because it is a new post-petition obligation, citing In re Clarke, 266 B.R. 301 (Bankr. E.D. Pa. 2001). Because I have concluded that the debtor has failed to carry her burden under section 523(a)(8), I need not address this argument.

11. The defendants are entitled to judgment against the plaintiff determining that plaintiffs' debts to the defendants are not dischargeable.



***/s/ Robert J. Faris***

**United States Bankruptcy Judge**

Dated: October 28, 2004